

Before the
COPYRIGHT ROYALTY JUDGES
The Library of Congress

In re

**DISTRIBUTION OF CABLE
ROYALTY FUNDS**

**CONSOLIDATED PROCEEDING
NO. 14-CRB-0010-CD
(2010-13)**

**RESPONSIVE BRIEF
OF THE SETTLING DEVOTIONAL CLAIMANTS**

Pursuant to the Judges' Order in 2010-2013 Allocation Proceeding Soliciting Further Briefing (the "Order"), the Settling Devotional Claimants ("SDC") submit the following Responsive Brief to the briefs filed by other parties.

I. JSC and SDC Agree that if the Basic Fund Shares are Tied to the Bortz Results, Then PTV's Award Should be Enhanced to Account for its Non-Participation in the 3.75% Fund.

The SDC's Brief In Response to Order Soliciting Further Briefing on Allocation ("SDC Brief") traced relevant royalty precedent on the issue posed in the Order and concluded that if the Bortz methodology is the basis for allocating Basic Fund shares, then Public Television's ("PTV") share should be enhanced to account for its non-participation in the 3.75% Fund. SDC Brief at 9-10. Joint Sports Claimants ("JSC") were in accord. *See* JSC Response to Order Soliciting Further Briefing ("JSC Brief") at 8.

This conclusion relies on two key precedents. First, in the determination in the 1998-1999 Cable Royalty Proceeding, the CARP qualified prior rulings by acknowledging that some adjustment to the Bortz survey results may be justified to account for PTV's non-participation in the 3.75% Fund. Importantly, the CARP

explicitly rejected PTV's assertion that its share should be adjusted "no matter which methodology is employed." *In the Matter of Distribution of 1998 and 1999 Cable Royalty Funds, Report of the Copyright Arbitration Royalty Panel to the Librarian of Congress*, Dkt. No. 2001-8 CARP CD 98-99 (Oct 31, 2003) at 26, n.10 (Ex. 6032 at 26 n. 10); *see* SDC Brief at 3-4. Second, in the Final Determination in the 2004-2005 Cable Proceeding, the Copyright Royalty Board followed the CARP's rationale. *Distribution of 2004 and 2005 Cable Royalty Funds*, Dkt. No. 2007-3 CRB CD 2004-2005, 75 FR 57063, 57068 (Sept. 17, 2010); *see* SDC Brief at 5.

Although the SDC agree that an upward adjustment to the PTV share of the Basic Fund using Bortz survey results would be consistent with logic and precedent, the particular mathematical adjustments proposed all assume a higher level of precision than the present record can support. Each of the proposed mathematical adjustments implicitly assumes that cable systems value content on 3.75% signals and non-3.75% signals similarly, in spite of the substantially higher rate for signals retransmitted on a 3.75% basis. There is not a basis in the record establishing such an assumption as fact. Therefore, any mathematical adjustment must be regarded as a rough approximation at best. It is for this reason that the SDC proposed a range, rather than a mathematical approach that may yield a false impression of precision. SDC Brief at 5.

II. CTV, PTV, and CCG Seek To Apply the Adjustment to Methodologies Other Than Bortz.

In the Commercial Television's ("CTV's") Initial Brief in Response to the Judges' June 29, 2018 Order ("CTV Brief"), CTV acknowledged that the CARP rejected PTV's argument to make an adjustment "based on any methodology other than 'a CSO survey

where the respondents are allocating a fixed budget among the various claimant groups.” CTV Brief at 3 (citation omitted; emphasis in original). Despite this precedent, CTV, PTV, and Canadian Claimants Group (“CCG”) all seem to argue that a 3.75% Fund adjustment should be applied to allocations based on methodologies that are unrelated to the Bortz survey results. CTV Brief at 9-11; PTV Brief at 13-15; CCG Brief at 6.

The SDC reiterate their position, as discussed at length elsewhere, that the fee-based regressions and the viewership-hours methodology presented as evidence in this proceeding are not useful in allocating shares of any fund. SDC Proposed Findings of Fact and Conclusions of Law at ¶¶ 67-123, 125-143, 159-161. Therefore, there is no basis on which to draw a conclusion as to whether any allocation of the Basic Fund using any of these methodologies should be adjusted to account for PTV’s non-participation in the 3.75% Fund, and no basis on which to propose a calculation for any adjustment. SDC Brief at 8-9.

The central premise of the argument that an adjustment should be applied regardless of the methodology used is that “the studies measure value based on the *total* amount of royalties paid to the Copyright Office, regardless of whether those royalties were generated at the Basic, 3.75%, or Syndex Rates.” PTV Brief at 1 (emphasis in original). This statement is arguably true as applied to the Bortz and Horowitz studies, both of which weight CSO survey responses by total royalty fees paid. But it is not true of the fee-based regression methodologies or the viewership-hours methodology.

Each of the fee-based regression methodologies estimates a correlation between minutes of program categories and fees paid, and then multiplies that coefficient by a measure of the number of minutes retransmitted – not fees paid. Ex. 2004 (Crawford

WDT), at A-4; Ex. 1003 (Israel WDT), at 20.¹ Each regression includes an indicator for retransmission of a 3.75% signal, which was presumably intended to remove the influence of the 3.75% rate in a rough way. Ex. 1003 (Israel WDT) at 18; Ex. 2004 (Crawford WDT) at App. A-2c (Fig. 21). Although not useful in interpreting value, the statistically significant coefficients for the indicator variables suggest that there is a systematic difference in the amount of royalties paid by systems and subscriber groups that retransmit 3.75% signals and those that do not (not surprising, considering that retransmission of a 3.75% signal by definition carries a higher rate). This systematic difference casts further doubt on the precision of any of the mathematical adjustments proposed.

III. Program Suppliers Confuse Distinct Nature of Funds with Bortz Survey Conclusions as to Share Awards.

The Program Suppliers' ("PS") viewership methodology presents an estimate of viewership hours, and has little to do with fees paid to the Copyright Office. The Program Suppliers' Memorandum of Law and Supporting Declarations Responding to Order Soliciting Further Briefing ("PS Brief") correctly notes that the three funds, Basic, 3.75% and Syndex, are distinct and not all claimants share in all the funds. However, correctly segregating the funds among claimants does not address the legal question of whether precedent requires an adjustment to the Bortz results to reflect PTV's share of the Basic Fund. The adjustment of Bortz shares is not designed to compensate PTV for non-participation in the 3.75% and Syndex Funds; rather, it is to recognize that the Bortz

¹ PTV refers to the fee-based regression approaches as "econometric" approaches. Actually, all of the methodologies presented in this case are purportedly "econometric," because all involve "the application of statistical methods to the study of economic data and problems." *Econometric*, Merriam-Webster Dictionary (Online), www.merriam-webster.com/dictionary (July 30, 2018). Of course, the characterization of a methodology as "econometric" does not imply that it is good.

survey does not ask CSOs to adjust their responses to reflect the participation (or non-participation) in the three funds by the various program categories.

Had the Bortz survey been structured to secure CSO responses based on three separate funds, it might have converted the Bortz survey from a reasonable task, JSC Ex. 1006 at 12, ¶ 33 (Written Direct Testimony of Dr. Nancy Mathiowetz), to an unduly complex one. *See* Tr. 679:20-680:20 (Mathiowetz) (where Dr. Mathiowetz addressed complicating survey questionnaires by adding more categories of claimants). Moreover, given the minuscule amount of money in the Syndex Fund, any calculation to compensate for that fund would constitute nothing more than a rounding error to a second or third decimal place, and any attempt to incorporate it into survey questionnaires would likely introduce a far greater risk of bias than it would cure.

IV. Conclusion.

As precedent from the cable royalty proceedings establishes, an adjustment for PTV to accommodate its non-participation in the 3.75% Fund is appropriate if the Bortz survey is the basis for allocating shares among the claimant categories. If any other methodology is employed, then there is no basis to determine how PTV's Basic Fund award should be established or adjusted, if at all.

Date: July 30, 2018

Respectfully submitted,

DEVOTIONAL CLAIMANTS

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Proof of Delivery

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